Tan Ah Tong v Parveen Kaur

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02–146 OF 2008
SURIYADI, WAN ADNAN MUHAMAD AND RAMLY ALI JJCA
14 APRIL 2009

B

Civil Procedure — Pleadings — Defence — Failure to plead one of five defences to negate consent — Whether failure to plead was fatal to appellant/defendant's case — Contracts Act 1950 s 14 — Rules of the High Court 1980 O 18 rr 8 & 12

C

Contract — Sale and purchase of land — Breach — Whether SPAs were entered into without knowledge, consent and/or authority of appellant/defendant — Whether SPAs were null and void — Frustration — Whether SPAs were rendered frustrated by condition imposed by the Pengarah Tanah dan Galian, Selangor — Whether specific performance order was rightly granted to respondent/plaintiff — Contracts Act 1950 s 14

D

E

Evidence — Documentary evidence — Admissibility — Appellant/defendant sought to admit photocopies of letters without adducing any evidence to show that letters were true copies of originals — Whether letters were admissible in evidence — Evidence Act 1950 s 73A(2)(b)

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Tan Ah Tong ('the appellant/defendant') and Parveen Kaur ('the respondent/plaintiff') entered into two separate sale and purchase agreements ('the SPAs') for the sale of two pieces of land situated in Gombak ('the lands'), for a consideration of RM13,920 and RM14,400 respectively. The respondent/plaintiff had fully paid the purchase price of the lands but claimed that the appellant/defendant had failed and/or neglected to take the necessary steps to obtain an individual title to the lands and to execute and register the Memorandum of Transfer of the lands to the respondent/plaintiff. The lands were later sold to a third party for the purpose of developing the lands for a housing project. The respondent/plaintiff then commenced the present action against the appellant/defendant for the breach of the SPAs. The appellant/defendant's main defence was that the SPAs were null and void as they were entered into by his former solicitors without his knowledge, consent and/or authority. The defendant further contended that according to a condition imposed by the Pengarah Tanah dan Galian, Selangor ('PTG') in the sub-division and conversion of the lands at least 50% must be allocated to Bumiputras, thus rendering the SPAs to be frustrated. The trial judge rejected the appellant/defendant's evidence that the lands were not sold to the plaintiff

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A and the defence that the sale of the land was done without the appellant/defendant's knowledge, consent or authority but found that the respondent/plaintiff had adduced sufficient evidence to show that she had made full payment for the lands under the two SPAs. The High Court judge thus allowed the respondent/plaintiff's claim with costs. This was the B appellant/defendant's appeal against that decision. The appellant/defendant submitted that the trial judge had erred in his findings and in coming to his decision.

Held, dismissing the appeal with costs:

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(1) In the present case the respondent/plaintiff had specifically prayed for specific performance relief in her statement of claim. Thus the appellant/defendant's contention that the specific performance order was wrongly given by the High Court on the grounds that the respondent/plaintiff had only prayed for damages did not hold water and D had to be rejected. Further the specific performance order was rightly granted as damages was not an adequate remedy (see paras 14 &15).

(2) The appellant/defendant had to raise and prove the existence of the five elements, namely coercion, undue influence, fraud, misrepresentation or E mistake to establish that it had not consented to entering into the SPAs. However, the appellant/defendant had failed to specifically plead the existence of any one of the five elements in his statement of defence as required under O 18 rr 8 and 12 of the Rules of the High Court 1980. Failure to plead any of those elements meant that the F appellant/defendant could not rely on any one of those five defences to negate his consent to enter into the SPAs (see paras 17–19).

(3) The appellant/defendant relied on three photocopied letters (the 3 letters) between him and his solicitor to support his allegation that the G SPAs were entered into without his knowledge, consent or authority and that he had terminated the services of his solicitors. However, the appellant/defendant had not adduced any evidence to show that these 3 letters were true copies of the originals. Thus the trial judge was correct in law when he held that these 3 letters did not qualify as certified true H copies within the meaning of s 73A(2)(b)of the Evidence Act 1950 and inadmissible in evidence (see paras 20–22).

(4) The appellant/defendant had not adduced any evidence to show that the condition imposed by the PGT continued to apply. Further as the lands had been sub-divided into 81 lots the appellant/defendant had not I adduced evidence to show how many of the 81 lots had been registered in the names of non-bumiputras. As the respondent/plaintiff's claim in the present case involved only two lots, it could still be registered in the name of the respondent/plaintiff, which was less than the 50% limitation imposed, if any (see paras 26–28).

[Bahasa Malaysia summary

Tan Ah Tong ('perayu/defendan') dan Parveen Kaur ('responden/plaintif') memasuki dua perjanjian jual beli yang berlainan ('PJB tersebut') untuk jualan dua bidang tanah yang terletak di Gombak ('tanah tersebut'), untuk balasan masing-masing sebanyak RM13,920 dan RM14,400. Responden/plaintif telah membayar sepenuhnya harga belian tanah-tanah tersebut tetapi menyatakan bahawa perayu/defendan telah gagal dan/atau cuai dalam mengambil langkah-langkah yang sewajarnya untuk memperoleh hak milik individu kepada tanah-tanah tersebut dan memeterai dan mendaftarkan memorandum pindah milik tanah-tanah kepada responden/plaintif. Tanah-tanah tersebut kemudiannya telah dijual kepada pihak ketiga untuk tujuan pembangunan tanah-tanah tersebut sebagai projek perumahan. Responden/plaintif kemudian memulakan tindakan ini terhadap perayu/defendan untuk kemungkiran PJB tersebut. Pembelaan utama perayu/defendan adalah bahawa PJB tersebut adalah batal dan tidak sah kerana ia telah dimasuki oleh peguamcaranya sebelum ini tanpa pengetahuan, persetujuan dan/atau kuasanya. Defendan selanjutnya menghujah bahawa menurut syarat yang diberikan oleh Pengarah Tanah dan Galian, Selangor ('PTG') di dalam pemecahan dan pindah milik tanah-tanah tersebut sekurang-kurangnya 50% mesti diperuntukkan kepada Bumiputra, dengan itu menyebabkan PJB tersebut dikecewakan (frustrated). Hakim bicara menolak keterangan perayu/defendan bahawa tanah/tanah tersebut tidak dijual kepada plaintif dan pembelaan bahawa jualan tanah tersebut dibuat tanpa pengetahuan, persetujuan dan kuasa perayu/defendan tetapi mendapati bahawa responden/plaintif telah mengemukakan keterangan yang mencukupi untuk menunjukkan bahawa dia telah membuat bayaran penuh untuk tanah-tanah tersebut di bawah kedua-dua PJB. Hakim Mahkamah Tinggi oleh itu membenarkan responden/plaintif menuntut kos. Ini adalah rayuan perayu/defendan terhadap keputusan tersebut. Perayu/defendan menghujah bahawa hakim bicara telah terkhilaf dalam dapatannya dan dalam mencapai keputusannya.

Diputuskan, menolak rayuan dengan kos:

(1) Di dalam kes ini responden/plaintif telah secara spesifik memohon pelaksanaan spesifik di dalam penyataan tuntutannya. Oleh itu, hujahan perayu/defendan bahawa perintah pelaksanaan spesifik diberikan secara salah oleh Mahkamah Tinggi atas alasan bahawa responden/plaintif hanya telah memohon ganti rugi tidak boleh dipertahankan dan oleh itu perlu ditolak. Selanjutnya, perintah pelaksanaan spesifik diberikan secara betul kerana ganti rugi bukan remedi yang mencukupi (lihat perenggan 14–15).

(2) Perayu/defendan telah membangkitkan dan membuktikan kewujudan lima elemen iaitu paksaan, dorongan, fraud, salah nyata atau kesilapan untuk membuktikan bahawa ia telah bersetuju untuk memasuki PJB

tersebut. Walau bagaimanapun, perayu/defendan telah gagal untuk memohon secara spesifik kewujudan mana-mana satu daripada lima unsur di dalam penyataan pembelaannya seperti yang diperlukan di bawah A 18 kk 8 dan 12 Kaedah-Kaedah Mahkamah Tinggi 1980. Kegagalan untuk memohon mana-mana daripada unsur tersebut bermaksud bahawa perayu/defendan tidak boleh bersandar atas mana-mana satu daripada lima pembelaan untuk menafikan persetujuannya untuk memasuki PJB (lihat perenggan 17–19).

(3) Perayu/defendan menyandar atas tiga surat yang dibuat salinan (tiga surat tersebut) di antara dia dan peguamcaranya untuk menyokong dakwaannya bahawa PJB tersebut telah dimasuki tanpa pengetahuan, persetujuan atau kuasanya dan dia telah membatalkan perkhidmatan peguamcaranya. Walau bagaimanapun, perayu/defendan tidak mengemukakan apa-apa keterangan untuk menunjukkan bahawa ketiga-tiga surat tersebut adalah salinan sebenar daripada yang asal. Oleh demikian hakim bicara adalah betul dari segi undang-undang apabila dia memutuskan bahawa ketiga-tiga surat tersebut tidak lulus sebagai salinan sebenar dalam rangkuman maksud s 73A(2)(b) Akta Keterangan 1950 dan tidak boleh diterima sebagai keterangan (lihat perenggan 20–22).

(4) Perayu/defendan tidak mengemukakan apa-apa keterangan untuk menunjukkan bahawa syarat yang dikenakan oleh PGT berterusan digunapakai. Selanjutnya, oleh kerana tanah-tanah tersebut telah dipecahkan kepada 81 lot perayu/defendan tidak mengemukakan keterangan untuk menunjukkan berapa daripada 81 lot tersebut yang telah didaftarkan atas nama bukan bumiputera. Oleh sebab tuntutan responden/plaintif di dalam kes ini melibatkan hanya dua lot, ia masih boleh didaftarkan atas nama responden/plaintif, yang kurang daripada 50% daripada had masa yang dikenakan, jika ada (lihat perenggan 26–28).]

Notes

For cases on admissibility of document in general, see *Mallal's Digest* (4th Ed, 2011 Reissue) paras 1283–1304.

For cases on breach, see 3(2) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 4910–4922.

For cases on defence in general, see 2(3) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 5943–5981.

Cases referred to

Tan Ah Chim & Sons Sdn Bhd v Ooi Bee Tat & anor [1993] 3 MLJ 633, HC (refd)

Legislation referred to

Contracts Act 1950 s 14
Evidence Act 1950 ss 73A(2)(b), 103
Rules of the High Court 1980, O 18 rr 8, 12
Specific Relief Act 1950 s 11, s 11(2)

Danny Yap (Shyong Wee & Danny) for the appellant.
Chandra Nair (Thevin Chandran & Associates) for the respondent.

Ramly Ali JCA:

[1] This is an appeal by the defendant/appellant against the decision of the learned High Court judge dated 17 January 2008, whereby after a full trial it was, inter alia, ordered that two sale and purchase agreements both dated 3 May 1974 in respect of two lands held under (a) HSM 1715 (4225) Lot No PT 2261 Mukim Hulu Kelang Batu 7 1/4 Hulu Kelang Daerah Gombak and (b) HSM 1716 (4226) Lot No PT 2262 Mukim Hulu Kelang Batu 7 1/4 Hulu Kelang Daerah Gombak were to be specifically performed subject to the fulfillment of certain conditions and costs were also ordered in favour of the respondent/plaintiff.

[2] The conditions imposed in the said judgment are as follows:

(a) The defendant shall, within a month hereof demand payment for the development costs to be charged and supported by the certificate from the defendant's accountant in accordance with P1A and P1B. The plaintiff shall make payment within a month of receipt of such demand from the defendant.

(b) The defendant shall, within a month hereof, demand payments of the conversion, the sub-division and survey fees from the plaintiff in proportion to the area of the plaintiff's sub-divided lots calculated on the amount claim by the Land Office, Gombak, and such demands shall be supported by the certificates from the defendant's accountant as to the correctness of the sums demanded. The plaintiff shall make payments within a month of receipt of such demand by the defendant.

(c) Any other outgoing that the plaintiff is liable to pay under the two agreements shall be settled within two months from the date of the order; and

(d) Provided that all the above have been settled within time, the defendant shall transfer the respective lots to the plaintiff within one month of full payment free from all imcumbrances and the expenses of such transfer

A shall be borne by the plaintiff.

THE PLAINTIFF'S CASE

B **[3]** The plaintiff's case rests on the contention that by two sale and purchase agreements (SPAs) dated 3 May 1974, the defendant (as vendor) agreed to sell to the plaintiff two pieces of lands for a consideration of RM13,920 and RM14,400 respectively. The plaintiff has fully paid the purchase price of the said lands.

C **[4]** The plaintiff claimed that in breach of the said SPAs, the defendant has failed and/or neglected to take the necessary steps to obtain an individual title to the said lands and to execute and register the memorandum of transfer of the lands to the plaintiff. To protect his interest the plaintiff continued to lodge caveat on the lands every six years.

D **[5]** The said lands were later sold to a third party, ie Asialand Housing Development Sdn Bhd for the purpose of developing the lands for a housing project.

E THE DEFENDANT'S CONTENTIONS

[6] The defendant, on the other hand, contended, inter alia, that the two SPAs were made by the defendant's former solicitors, M/s Kirpal Singh Brar &
F Co (who had left the country and cannot be traced) without the knowledge and consent or authority of the defendant, as the defendant had on 20 April 1974 terminated with immediate effect the service of the said solicitors. Therefore the defendant claimed that the said SPAs are null and void and of no effect.

G **[7]** The defendant further contended that there was a condition imposed by the Pengarah Tanah dan Galian, Selangor for the sub-division and conversion of the said lands, that at least 50% of the lots in respect of the said lands must be allocated to Bumiputra, thus rendering the said SPAs to be frustrated.

H FINDINGS OF THE HIGH COURT JUDGE

[8] The learned High Court judge allowed the plaintiff's claim with costs. Hence, this appeal before us now.

I **[9]** In his judgment the learned High Court judge had made the following findings:

(a) the plaintiff has adduced sufficient evidence to show that she has made full payment for the lands under the two SPAs;

(b) the evidence of the defendant that the two pieces of land were not sold to the plaintiff are rejected by the learned High Court judge;

(c) the defendant has failed to plead all the facts of fraud or mistake specifically; and no allegation of misrepresentation against his former solicitors, M/s Kirpal Singh Brar in his amended statement of defence; and

(d) thus the learned High Court judge rejected the defence that the purported sale of the said lands was done without his knowledge, consent or authority.

FINDINGS OF THIS COURT

[10] In the present case, the decision of learned High Court judge was based on his findings of facts, after full trial of the suit before him. Therefore this court should be slow to interfere with the decision based on such findings of facts unless there is clear justification for us to do so.

[11] The first issue raised by the appellant (defendant) in this appeal is that the learned High Court judge was wrong in allowing specific performance relief of the two SPAs infavour of the plaintiff.

[12] It is not in dispute that the subject matter of the present case is the two SPAs in respect of landed property. Section 11 of the Specific Relief Act 1950 (Act 137) provides that the specific performance of any contract is a discretion of the court. It may be exercised when the act agreed to be done is such that pecuniary compensation for its non-performance would not afford adequate relief.

[13] Section 11(2) of the same Act provides:

(2) Unless and until the contrary is proved, the Court shall presume that the breach of a contract to transfer immovable property cannot be adequately relieved by compensation in money, and that the breach of a contract to transfer movable property can be thus relieved.

(see *Tan Ah Chim & Sons Sdn Bhd v Ooi Bee Tat & Anor* [1993] 3 MLJ 633)

[14] In the present case the plaintiff had specifically prayed for specific performance relief in their statement of claim (prayer a). Therefore the defendant's contention that the specific performance order was wrongly given by the High Court on the ground that the plaintiff had only prayed for damages, does not hold water, and must be rejected.

[15] This court agrees with the learned High Court judge that in this case damage is not an adequate remedy and therefore the specific performance order was rightly granted.

[16] The defendant's main defence is that the said SPAs were entered into by his former solicitors without his knowledge, consent and/or authority, as according to the defendant, he had on 20 April 1974, terminated with immediate effect the service of the said solicitors, and as such the said SPAs are null and void.

[17] On this issue the court shall refer to s 14 of the Contracts Act 1950 which reads as follows:

> *Consent is said to be free when it is not caused by:*
>
> (a) coercion, as defined in section 15;
>
> (b) undue influence, as defined in section 16;
>
> (c) fraud, as defined in section 17;
>
> (d) misrepresentation, as defined in section 18; *or*
>
> (e) mistake, subject to sections 21, 22 *and* 23.
>
> *Consent is said to be so caused when it would not have been given but for the existence of such coercion, undue influence, fraud, misrepresentation, or mistake.*

[18] In this respect the court agrees with the learned High Court judge that in order to establish his defence on this point, the defendant must raise and prove any one of the five defences listed above.

[19] The existence of coercion, undue influence fraud, misrepresentation or mistake (or any of them) if proven, may negate the element of consent by the defendant (as he alleged), in entering into the SPAs. In order to prove any of the elements above, it must first be specifically pleaded by the defendant in his statement of defence as required under O 18 r 8 and r 12 of the Rules of the High Court 1980. Failure to specifically plead any of those elements is fatal to the defendant's case. In the present case, the defendant has failed to specifically plead any of those elements, in his statement of defence. Therefore, the defendant cannot in law rely on any of those defences.

[20] The defendant relied on the documents marked as IDD41, IDD42 and IDD43 to support his allegation that the said SPAs were entered into without his knowledge, consent or authority and that he had terminated the service of Mr Kirpal Singh Brar as his solicitors with immediate effect in 1974.

[21] IDD41 is a photostat copy of a letter dated 20 April 1974 from the defendant to Mr Kirpal Singh Brar. IDD42 is a photostat copy of a letter dated 22 April 1974 from Mr Kirpal Singh Brar to the defendant. IDD43 is a photostat copy of a letter dated 7 November 1975 from Mr Kirpal Singh Brar to the defendant.

[22] The defendant admitted in his evidence that he had misplaced (thus cannot be traced) the original copies of all the documents IDD41, IDD42 and IDD43. The defendant has not adduced any evidence to show that all the three documents were true copies of the originals. The learned High Court judge was correct in law when he held that those uncertified copies of the three documents do not qualify as certified true copies within the meaning of s 73A(2)(b) of the Evidence Act 1950 and therefore not admissible in evidence. Therefore the defendant's defence on this issue cannot stand.

[23] The defendant also contended that the learned High Court judge was wrong in dismissing his defence that the defendant did not sign the two SPAs and the signature there was not his.

[24] It is noted that the defendant introduced this line of defence (that the signatures in the two SPAs were not his), only at the defence stage and thus has certainly caught the plaintiff by surprise. The issue has not been pleaded at all in the statement of defence.

[25] Again, on this issue the court agrees with the findings of the learned High Court judge when he said:

> So under s 103 of the Evidence Act 1950 it is incumbent on the defendant to show that it was not his signatures on P1A and P1B and not the burden of the plaintiff.
>
> The defendant has not adduced any evidence by a handwriting expert that the signatures on P1A and P1B are not his.
>
> The defendant has admitted in cross-examination that at least 45 sale and purchase agreements had been handled by Kirpal Singh Brar & Co. As such I reject the evidence of the defendant that he did not sign P1A and P1B.

[26] The defendant has also raised the issue that a condition imposed by the Pengarah Tanah dan Galian Selangor for the said sub-division and conversion of the said lands is that at least 50% of the lots is to be allocated and transferred to Bumiputras, thus rendering the said SPAs to be frustrated and specific performance is not possible.

[27] The court finds no evidence adduced by the defendant to show the said restriction continued to apply. There is also no evidence to show any endorsement of such restriction on the title of the said lands.

[28] In this case the lands in question had been sub-divided into 81 lots. The defendant has not adduced evidence to show how many of the 81 lots have been registered in the names of non-bumiputras. In a consolidated suit, Her Ladyship Siti Norma Yaacob found that a total of 25 lots have been registered in the names of non-bumiputras. The plaintiff's claim in the present case involves only two lots. The addition of those two lots makes a total of 27 lots. So, the two lots (which are the subject matter of the present case) can still be registered in the name of the plaintiff as it is still less than 50% limitation imposed by the land office (if any), thus making it possible for the two SPAs to be specifically enforced, as ordered by the learned High Court judge.

CONCLUSION

[29] After hearing all the parties, the court is satisfied that the appellant (defendant) has failed to convince the court that the learned High Court judge had erred in coming to his decision dated 17 January 2008. The learned High Court judge had made correct findings of relevant facts and therefore has come to a correct decision. There is no justification whatsoever for this court to interfere with his decision.

[30] Therefore, on the above considerations, we, unanimously dismiss the appeal with costs. The order of the learned High Court judge is affirmed. Deposit to the account of taxed costs.

Appeal dismissed with costs.

Reported by Kohila Nesan